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Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

DONALD ENGLISH,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
STATE OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

(1) Did the Seventh Circuit Court of Appeals follow Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed.2d 476 (1994)?

(2) Did joinder violate Federal Rules of Criminal Procedure 8(b)?

(3) Should petitioner's case have been severed pursuant to Federal Rule of Criminal Procedure 14?

(4) Was criminal forfeiture authorized to extent entered?

(5) Was character evidence introduced in violation of Federal Rules of Evidence 401 and 404(b)?

(6) Were improper jury instructions given?

List of Parties to the Proceeding in the Court Whose Judgment is Sought to be Reviewed

The caption contains the names of all the parties. No corporations are involved.

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Citation to Opinion Below

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below. The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix B.

Jurisdictional Statement

The United States Court of Appeals for the Seventh Circuit decided this case March 25, 1999.

A timely petition for rehearing was denied on May 18, 1999.

The time to file this petition will expire on August 16, 1999.

This Court's jurisdiction is believed to be conferred by the provisions of 28 USC §1254(1).

Constitutional Provisions and Statutes Involved

Sixth Amendment to the Constitution of the United States

28 U.S.C. Appendix Rules of Evidence 804(b)(3)

Federal Rule of Criminal Procedure 8(b)

Federal Rule of Criminal Procedure 14

28 U.S.C. Appendix Rules of Evidence 401

28 U.S.C. Appendix Rule of Evidence 404(b)

21 U.S.C.A. § 846

21 U.S.C.A. § 841(a)

21 U.S.C.A. § 853(a)

Rules of the Supreme Court, Rule 10

Statement of Case

The District Court: (1) allowed the Government to use a jailhouse informant's hearsay testimony that petitioner's co-defendants had told him petitioner was guilty; (2) allowed the Government to join petitioner's charge of conspiracy to distribute a controlled substance with charges against his co-defendants of attempted murder; (3) failed to sever petitioner from the trial of his co-defendants even though the court knew the Government would use the jailhouse informant's hearsay against petitioner; (4) allowed character evidence to be used against petitioner; and (5) forfeited petitioner's property in an amount equal to the value of methamphetamine and marijuana combined, even though petitioner's sentence was lessened to reflect that he was guilty only of marijuana distribution.

The Court of Appeals for the Seventh Circuit said all this was just fine, especially the part where the jailhouse informant testified that petitioner's co-defendants had told him that petitioner was guilty.

Petitioner, Donald English, along with John Manley, Jack Rigsby, Sr., William Randall Smith, and Raphael Zavala, stood trial on the Government's charge that they conspired to distribute illegal drugs from November 1985 to March 31, 1996. 21 U.S.C. § § 841(a) and 846.

Manley and Rigsby also were charged in the same case with the separate federal crimes of attempting to kill a government informer and using and carrying a firearm in that attempt. Petitioner neither was charged nor was involved in either of these crimes.

The Government also brought criminal forfeiture proceedings against all co-defendants. 21 U.S.C. § 853(a).

Petitioner, before trial, moved to sever his case from the others pursuant to both Federal Rules of Criminal Procedure 8(b) and 14. His motions were denied.

Before trial, Manley, Rigsby, and Zavala were held in jail, along with a Paul Oakley. Oakley was being held awaiting sentencing on an unrelated case.

Petitioner was not in jail. He was free on bond.

Petitioner, before trial, and on grounds of hearsay, moved to exclude Oakley's testimony that while he had been in jail with co-defendants Manley, Rigsby and Zavala they each separately inculpated themselves and further had told him that petitioner was involved in the alleged conspiracy. Petitioner relied on Williamson v. United States, 512 U.S. 594, 114 S .Ct. 2431, 129 L. Ed.2d 476 (1994).

The Government argued that Oakley's testimony was admissible as a penal interest exception to the hearsay rule pursuant to Federal Rule of Evidence 804(b)(3).

The District Court denied petitioner's motion, and allowed the testimony, ruling that Williamson did not preclude use of such testimony, but instead created an "inner workings of conspiracy" aid to the penal interest exception to the hearsay rule. The Seventh Circuit agreed.

Notwithstanding that the Indictment charged petitioner with a conspiracy dating from November 1985 to March 31, 1996, the District Court allowed Government witness LaDonna Duncan to testify that she had obtained marijuana

from petitioner in 1983, two years before the Government claimed the conspiracy formed. The court had denied petitioner's pretrial motion to prohibit this testimony, and at trial, overruled petitioner's relevancy objections. Petitioner then moved to strike her testimony. He lost. The court instead, during her testimony, gave an instruction to the jury that limited use of her testimony to show petitioner's "knowledge and intent."

After closing argument, the District Court, over petitioner's objection, instructed the jury that: (1) the Government had to prove a conspiracy and that petitioner knowingly and intentionally became a member; and (2) in determining whether a conspiracy existed, they were to consider the actions and statements of the alleged participants. The District Court refused petitioner's proposed instruction 10 which would have limited use of the statements made by Rigsby, Manley and Zavala to Oakley exclusively against the defendant who made each statement.

A jury convicted petitioner, and entered a finding of forfeiture. Petitioner was sentenced to 156 months imprisonment and ordered to forfeit $4,000,000.

The District Court's jurisdiction was based on 18 U.S.C. 323, 21 U.S.C. 841(a)(1) 846, 953, and 21 U.S.C. 853(p), 841(a)(1).

The jurisdiction of the United States Court of Appeals, Seventh Circuit, was based on 28 U.S.C. 1291.

Reasons for Allowing This Writ

A.

Summary

Writ of Certiorari should be granted for the following reasons:

(1) the command of Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994), was not followed;

(2) the notion that Williamson has created an "inner workings of a conspiracy" aid to admission of evidence under Federal Rule of Evidence 804(b)(3) must be destroyed;

(3) it should be overtly stated that Williamson is an exercise of supervisory authority over admission of evidence in federal courts;

(4) this court needs to make clear to inferior federal courts that Williamson is a prophylactic rule fashioned to prevent federal courts from violating Sixth Amendment rights of confrontation;

(5) this case is a proper vehicle to make clear that the intention of Williamson is to preclude use in federal courts of "vicarious" admissions and confessions;

(6) alleged statements made to a jailhouse informant should be included within Williamson's sweep;

(7) in the interests of federalism, it needs to be acknowledged that the states are free to interpret their own penal interest exception to the hearsay rule so long as the Sixth Amendment is not violated; in that regard:

(a) in conjunction with Lilly v. Virginia, 1999

WL373136 (U.S. Va.) ___ U.S. ___, 119 S. Ct. 1887, ___ L. Ed. 2d ___ (1999), strengthening Williamson's federal court prophylaxis to include "vicarious" admissions and confessions of all kinds may reduce the number of cases brought to this Court from the states on claims of Sixth Amendment violations;

(8) federal courts need encouragement to exercise more supervisory authority over prosecutorial choices of joinder;

(9) the extent of joint and several liability in criminal forfeitures needs delineation;

(10) lower courts need direction with respect to proper use of Federal Rules of Evidence 401 and 404(b) in conspiracy cases;

(11) lower courts need direction with respect to proper jury instructions in conspiracy cases.

B.

Amplification of Reasons for Granting Writ

Reasons 1 through 6 - Williamson

In Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994), this Court announced for federal courts the permissible scope of the penal interest exception. In that case, a Reginal Harris was stopped for a traffic violation and consented to a search of his car. Cocaine was found. The police questioned Harris. In response to their questions, he inculpated Williamson. At Williamson's trial, the district court allowed the police to testify what Harris had told them that inculpated Williamson. Since Harris was the declarant, and since Williamson, not Harris, was on trial, Harris's statement to the police was hearsay. The district

court ruled, however, that since Harris had inculpated himself as well as Williamson, the penal interest exception contained in Rule 804(b)(3) allowed admission of the testimony.

This Court disagreed, holding that out of court declarations may be admitted only if, and then only to the extent, they inculpate the declarant.

The court first construed the content of Fed. Rule Evid. 804(b)(3) as:

> Statement(s) which . . . at the time of (their) making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement(s), unless believing (them) to be true.

In that construction, this Court's first task was to declare the meaning of the word, "statement." There were two possible meanings. Under one, an entire declaration, both the self-inculpatory as well as the non-self-inculpatory parts, are admissible if in the aggregate the declaration sufficiently is self-inculpatory. Under the other meaning, only the portions of the declaration that inculpate the declarant are admissible.

This Court adopted the second, more narrow, meaning. Williamson held that only the portions of a statement that inculpate the declarant are admissible under Rule 804(b)(3); the portions that inculpate others are not admissible. 512 U.S. 594, 599.

A simple statement of the Williamson rule may be as follows: a declarant is free to waive his own penal interest, but a declarant cannot waive the penal interest of another. The error Williamson precludes is the introduction into evidence of "vicarious" admissions or confessions. Introduction of vicarious admissions of confessions necessarily always will present potential violations of the Confrontation Clause. Hence, if

they are precluded, ipso facto there can be no possibility of corresponding constitutional transgressions.

The intended purpose of Williamson was prophylactic. It was intended to interpret Federal Rule of Evidence 804(b)(3) so federal courts would be prevented from denying any defendant a Sixth Amendment right of confrontation.

"Neutral" statements, however, may be used against a non-declarant, because they do not operate as "vicarious" confessions, and do not carry the potential for constitutional error that "vicarious" confessions or admissions do, namely, denial of the right of confrontation secured by the Sixth Amendment. For example, defendant is on trial for robbery. He and the declarant are caught red-handed outside the store that was robbed, sitting with masks on in the car with the store's money pouch on the seat between them. The declarant's out-of-court statement, "I robbed the bank," may be admissible in defendant's trial. The fact that declarant's statement can be used together with the circumstances of defendant's arrest as evidence of defendant's guilt does not deny defendant any right to confront and cross-examine the declarant, because there is no "vicarious" confession.

In the case at bar, however, Williamson was not followed by two federal courts, one a trial court, the other an appellate court. Both allowed a jailhouse informant to testify to vicarious confessions, and both justified their rulings by saying Williamson created an "inner workings of conspiracy" aid to Rule 804(b)(3).

The United States Court of Appeals for the Seventh Circuit explicitly holds that Williamson does not exclude out of court statements that inculpate a non-declarant defendant so long as the trial judge: (1) independently considers each portion of the statement; and (2) for each admitted portion finds that it is sufficiently against the declarant's penal inter-

est to be admissible. The Seventh Circuit justified this approach by misusing Mr. Justice Scalia's statement in Williamson that "a declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissible merely because the declarant names another person or implicates a possible co-defendant." The Seventh Circuit says they "think the statements to Oakley, which demonstrated an insider's knowledge of this drug ring, were against the declarant's penal interest, and those parts of the statements that mention (petitioner) English were admissible." Federal courts within the Seventh Circuit, thus, are free to allow the Government to use a "vicarious" confession. Although the Seventh Circuit's opinion in this case is unpublished, petitioner predicts that if this court does not correct their error, a like ruling in a later case will be published. That must be prevented. The holding of the Seventh Circuit in this case, therefore, so far departs from this Court's holding in Williamson as to call for this Court's exercise of supervisory power. The Seventh Circuit's holding is not a misapplication of a properly stated rule of law; it is, rather, a misapprehension of the proper rule of law—and one of constitutional magnitude to boot. U. S. Sup. Ct. Rule 10, 28 U.S.C.

This Court can ill afford to devise protection for the Confrontation Clause and then allow inferior federal courts to breach that protection.

This case also presents this Court with the opportunity to extend the holding of Williamson v. United States to preclude use of statements made to jailhouse informants. Petitioner has duly noted the Chief Justice's comments contained in his concurring opinion in Lilly and notes as well the pregnant implications contained in the majority opinion that indicate "special suspicion" of declarations made to police in custodial confessions. Lilly, 1999 WL37316, at page 17. Although those

comments are contained in a case arising from a state rather than a federal court, nevertheless, it is suggested that to explicitly include within Williamson's sweep a statement allegedly made to a jailhouse informant is a healthy exercise of this Court's supervisory power over admission and exclusion of evidence in federal courts. Out-of-court vicarious admissions made to jail house informers are fraught with possibilities of deceit and double-dealing by out of court declarants, and neither this deceit, nor double-dealing, nor plain self-interested lying is subject to exposure through cross-examination, if the declarant never is presented as a witness. These vicarious confessions are not the kind of statement that can be thought of as so inherently reliable as to dispense with the need for cross-examination. It is suggested that inclusion of statements made to a jailhouse informant within Williamson's scope will only enhance the healthy "bright line" intended by Williamson.

Finally on this issue, this case presents an issue of simple justice. Petitioner was convicted in violation of the rule of Williamson v. United States and he should stand on equal footing with all other defendants in the federal system, most of whom will get the benefit of Williamson v. United States.

Reason 7 –Confrontation Clause and the States

The need to clarify that relationship between hearsay and the Confrontation Clause largely grew out of state cases reviewed for constitutional violations. Before Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 923 (1965), applied the Sixth Amendment right to confront witnesses to the states, there was little need "to clarify the relationship between the right of confrontation and the hearsay rule, inasmuch as its supervisory powers over the inferior federal courts permit-

ted" this Court to control admission of hearsay. Thus, in concluding that the "co-conspirator exception to the hearsay rule is consistent with the Confrontation Clause, this Court formulated the scope of the exception pursuant to its supervisory powers." Constitution of the United States of America, Analysis and Interpretation, 92d. Congress, 2d Session, Document No. 92-82 (1973), citing Delaney v. United States, 263 U.S. 586, 590, 44 S. Ct. 206, 68 L. Ed. 462 (1924), Krulewitch v. United States, 336 U.S. 440, 443-445, 69 S .Ct. 716, 718-719, 93 L. Ed. 790 (1949), and Lutwak v. United States, 344 U.S. 604, 618-619, 73 S. Ct. 481, 489-490, 97 L. Ed. 593 (1953). *See* also, Wong Sun v. United States, 371 U.S. 471, 490, 85 S. Ct. 407, 418-419, 13 L. Ed. 2d. 923 (1963), which held that in federal cases any out-of-court declarations made after arrest may not be used against one of declarant's partners in crime as a co-conspirator exception to the hearsay rule.

The latest of those state cases is Lilly v. Virginia, 1999 WL373136 (U.S. Va.), ___ U.S. ___, 119 S. Ct. 1887, ___ L. Ed. 2d ___ (1999), in which this Court held that Virginia applied its own penal interest exception in violation of the Confrontation Clause.

In cases involving the penal interest exception that arise from the various states, therefore, the issue always will be one of constitutional magnitude. On the other hand, by interpreting the federal rules of evidence, as in Williamson, Confrontation Clause issues arising from federal courts are prevented.

The point is this: although a ruling in this case would not bind the states, a decision in this case that precludes use of vicarious admissions and confessions of all kinds can have two healthy effects on the states: (1) on the one hand, such a decision may discourage state courts from excluding evidence that is proper under the Confrontation Clause, for example, the kinds of statements that are exemplified by Justice

O'Conner in Part IIB of the opinion in Williamson, while on the other hand; (2) discourage state courts from admitting evidence that has the potential to violate the Confrontation Clause. Thus, not only would the states be encouraged toward proper application of the rules of evidence, but also one might reasonably expect a decline in Confrontation Clause cases coming to this Court from the states.

Reason 8 – Joinder and Severance

Courts exercise only the most cursory oversight over prosecutorial choices in joinder. This case presents this Court with the opportunity to clarify the meaning of the phrase, "same series of acts or transactions" and prevent further misjoinders by the Government.

The Indictment, on its face, establishes misjoinder. Rule 8(b), Federal Rules of Criminal Procedure, allows two or more defendants to be charged in the same Indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b).

The question under Rule 8(b), therefore, is whether the acts charged in all Counts are the same "series of acts or transactions." If they are not, there is misjoinder and the question of prejudice is not reached. United States v. Velasquez, 772 F.2d 1348 (7th Cir. 1985).

The phrase "same series of acts or transactions" means "acts or transactions" that are pursuant to a common plan or common scheme. United States v. Valasquez, citing United States v. Cavale, 688 F. 2d at 1106; United States v. Scott, 413 F. 2d 932, 935 (7th Cir. 1969); United States v. Lane, 735 F. 2d 799, 805. (5th Cir. 1984). Ordinarily, issues of common plan or "same series of acts or transactions" examines whether the

transactions have occurred in the same place, within a short period of time, and using the same *modus operandi*. United States v. Scott, 413 F. 2d 932 (7th Cir. 1969). None of those factors are present in the Indictment in this case.

The Government did not indict petitioner with attempting or conspiring to kill the Government's informant witness, yet joined him in the conspiracy charge not only with those who did, but then joined the charges of attempt murder and the firearms charges against Manley and Rigsby with the conspiracy charge. The Government did not indict petitioner with attempted murder and carrying a firearm, because the Government knew he was not liable. The Government knew he was not liable, because he was not involved. If the Government had believed that the attempt murder and the firearms charges were part of the same "series of acts or transactions" stated in the charge against petitioner, the Government also would have included petitioner in the attempt murder charge and firearms charge, because the act of one co-conspirator is the act of all and all are liable. *See*, e.g., United States v. Alvarez, 755 F. 2d 830 (11th Cir. 1985). Therefore, since petitioner was not charged with the attempt murder or carrying a firearm, the Government tacitly concedes that Counts 2 through 7 are not part of the "same series of acts or transactions" alleged in Count I. The Government, thus, tacitly concedes misjoinder. This Court needs to encourage federal courts to exercise oversight over these kinds of prosecutorial charges to prevent error.

In the unlikely event joinder initially was proper under Rule 8(b), nevertheless, Rule 14 called for severance.

In conspiracy cases, there is an inclination to admit evidence that otherwise would be excluded. Joint trials exacerbate that tendency.

In this instance it would have been unlikely that the jury could avoid taking the evidence relevant only to Rigsby and Manley, murder and firearms, and using it to bolster the strength of the evidence of conspiracy presented against petitioner.

The Government's case against petitioner consisted of a note written by petitioner, some telephone records, some lack of tax filings, and a co-conspirator. Had petitioner's case been severed, the jury could have boiled the case down to whether they believed the co-conspirator, a person who had made a deal with the Government. Since petitioner was not severed, however, the jury heard all the testimony from all other witnesses, whether their testimony related to petitioner or not, and saw physical evidence that related only to the other defendants, not the least of which was Government's Exhibit #110A, a transcript of a 911 tape.

The tape was a recording of a call made by the co-conspirator to 911 to report that he had been shot by Manley and Rigsby.

This evidence was relevant only to the attempt murder and the firearms charges. It condemned Rigsby, condemned Manley, but had no substantive effect on petitioner; he was not involved in the shooting. Nevertheless, both tape and transcript could be used by the jury to corroborate this witness. The jury, logically could say, "Well, we had doubts until then, but that tape sure told the story—he's telling the truth and since he told the truth about Manley and Rigsby shooting him, he's telling the truth about petitioner."

The legal truth, however, is that had the misjoinder under Rule 8 been recognized and the case severed, neither tape nor transcript would have been admitted in petitioner's trial. The refusal to sever allowed the Government to bolster the credibility of the only real witness against petitioner by means that

otherwise would have been impossible.

This Court needs to address the growing and understandable, tactical preference of prosecutors for joint trials of defendants charged with conspiracy.

Reason 9 – Forfeiture

The district court found petitioner jointly and severally liable with the others, and submitted the forfeiture to the jury who found English liable for $4,000,000.00, citing United States v. Benevento), 663 F. Supp. 115, 118-9 (S.D. N.Y. 1987), aff'd 836 F. 2d 129 (2d Cir.1988) (per curium). That case is not precedent for this case. In Benevento, it was clear that all co-defendants were responsible for the conduct of all the others. Benevento is a straightforward joint and several liability case.

Petitioner concedes he is liable jointly and severally with those with whom he was indicted if found guilty. His claim is not that he was made "too jointly and severally liable." His claim instead is that he cannot be liable, either singly, or jointly and severally, beyond the extent the evidence proved his involvement.

In this case, the Government's evidence as to petitioner only supports one of the dual purposes of the conspiracy—marijuana—and does not support the other—methamphetamine. Further, even by the Government's version of the evidence, petitioner quit the conspiracy in August of 1994. These factors led the district court to impose sentence only to the extent of English's own responsibility in accordance with the Sentencing Act,—i.e. marijuana. The district court in contrast, however, imposed judgment in forfeiture beyond petitioner's responsibility,—i.e. both marijuana and methamphetamine.

If the purpose of the criminal forfeiture statute is punishment and the judgment is *in personum* rather than *in rem*, United States v. Nelson, 851 F. 2d 976, 981 (7th Cir. 1988), it likewise should follow that petitioner should not be exposed to an *in personum* judgment beyond the conspiracy with which the court and jury believed he was involved. Petitioner should not have been held jointly liable to an extent greater than that to which he could be exposed under the Sentencing Act. Forfeiture, therfore, should have been limited to the value of the marijuana.

This Court needs to announce a definitive statement of the extent of exposure in joint cases for forfeiture.

Reason 10 – Character Evidence

The Government called Ladonna Duncan to testify she obtained marijuana from petitioner on several occasions in 1983. That is irrelevant, because these occasions predate the conspiracy charged. Thus, this testimony does not make a fact of consequence more or less probable. Fed. Rule Evid. 401.

The District Court admitted this evidence for the limited purpose of showing "knowledge" and "intent." Since the conspiracy had not yet formed, petitioner could not have knowledge of something that had yet to occur. Duncan's testimony, therefore, could not make his knowledge of this conspiracy either more or less probable.

The same argument applies to "intent." The essence of conspiracy is an agreement. Duncan's testimony cannot suggest petitioner intended to make an illegal agreement, because the alleged events occurred two years before the alleged agreement was made.

The limiting instruction made worse the mischief.

The limiting instruction told the jury that if they believed

Duncan, they could use her evidence that she got marijuana from petitioner several years before a conspiracy existed to infer that petitioner knew of the conspiracy and intended to join it, and thus could infer that he was guilty as charged.

Thus, the only purpose of her testimony was to prove character, in violation of Rule 404(b).

Reason 11 – Jury Instructions

The jury was not instructed properly. At the least, the jury should have been instructed to limit use of a defendant's statement to the defendant who made it. Petitioner made this request. The court refused. It will be recalled that earlier, the court had allowed Paul Oakley to testify that Rigsby, Smith and Zavala had told him that petitioner was guilty. If it was error to admit this evidence, it likewise was error in refusing this instruction.

The instructions acted in combination with the limiting instruction as to Ladonna Duncan's testimony to advise the jury that they could convict petitioner on non-substantive evidence.

The instructions told the jury that knowledge was an element of the crime charged, and that knowledge meant petitioner realized what he was doing. The jury, therefore, could take all this to mean that if petitioner knew he was dealing marijuana to Duncan in 1983, then petitioner acted "knowingly" to conspire to . . . distribute . . . marijuana . . . ."

The jury then further could find that since petitioner knowingly distributed marijuana to Duncan, he intended to join the conspiracy. Government's instruction 11 informed the jury that the Indictment charged a conspiracy from November 1985 until about March 31, 1996, but further told them that the evidence need only establish that the offense was

committed on a date reasonably near to the date charged. Since the instruction did not say one way or the other, the jury could believe that 1983 was close enough to November 1985 for English to be guilty. The court, thus, told the jury that they could use a two year old bad act from which to infer English's knowledge of a conspiracy that had not yet been formed and to infer his intent to join what had not been formed. Finally, Government's instruction 8 finished the job. That instruction told the jury that in determining whether petitioner was a member of the conspiracy they might consider:

(1) evidence of his conduct; and

(2) the evidence of what other co-conspirators had said "during the course of and in furtherance of" the conspiracy.

As to the latter point, the jury would not have known that Oakley's hearsay testimony that co-conspirators told him that petitioner was guilty was admitted under the "penal interest" exception instead of "during the course of conspiracy" exception. Wong Sun, 371 U.S. 471, would have excluded that testimony if offered under the "during the course" of conspiracy exception. Therefore, the jury could have believed, and most likely did believe, that what Rigsby, Manley, and Zavala had told Oakley was told "in the course of and in furtherance of the conspiracy."

The jury, therefore, was instructed that they could find petitioner guilty because of: (1) his conduct (before the conspiracy began, he had delivered marijuana to Duncan); and (2) what co-conspirators said (Oakley swore that the others had told him that petitioner was guilty). The evidence that had been erroneously admitted, therefore, operated in tandem with the improper instructions to allow the jury to convict petitioner, even if they disbelieved all the evidence that had been properly admitted against him. The jury might not have

believed the co-conspirator, and attached little weight to the other evidence, namely: the note, the telephone records and the lack of some tax filings. Yet, as instructed, Duncan's testimony and Oakley's testimony both were inadmissable. Thus, petitioner's conviction may rest entirely on inadmissable evidence, and therefore, must be reversed.

This Court should address this problem in light of a growing tendency to bring conspiracy charges in preference to charges of choate offenses.

Conclusion

Petitioner requests this Court to grant his Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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